that the value of broadcast stations are on the rise, and the "pace of sales is quickening." "Fox Deal Is Adding Luster to the Investment Value of Television Stations," New York *Times*, June 13, 1994 at D7. In fact, demand for television stations is at one of its highest levels in years. *See* "TV Buyers Agree: It's a Seller's Market," Broadcasting & Cable, April 25, 1994 at 22.[26] These indicators supply further support for the fact that broadcast spectrum is a scarce and valuable resource.

C. The Public Trustee Concept of Broadcast Regulation Formulated in *Red Lion* is Applicable to PTAR.

In relying solely on the agency's decision in *Syracuse Peace Council*, First Media ignores the basic principle that trustee obligations imposed on broadcasters in exchange for exclusive use of scarce broadcast spectrum are a constitutionally permissible form of regulation. First Media pays lip service to the unanimous Supreme Court decision in *Red Lion v. FCC*, 367 U.S. 395 (1969) which articulates this basic precept:

> [b]ecause of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of viewers and listeners, not the right of broadcasters, which is paramount.

Id. at 389.[27] Without discussing the case or its premise, First Media mentions *Red Lion* in the context of a discussion of the type of technologies that have appeared since the case was

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[26]The story reports that 22 television stations were sold in 1994 for a total dollar volume of $374.9 million.

[27]The *Red Lion* Court said, "[t]here is nothing in the First Amendment which prevents the Government from requiring a licensee to share his frequency with others and to conduct himself as a proxy or fiduciary...." *Id.* at 389.

decided. First Media Petition at 7. It also states that in light of these new technologies, "the Commission [in *Syracuse Peace Council*] urged that the *Red Lion* premise be reassessed."

But *Red Lion*, and its holding, cannot be dismissed so cavalierly. Even the passage from *Syracuse Peace Council* cited by First Media recognizes the continuing validity of *Red Lion* in the absence of judicial action:

> [W]e recognize that to date the Court has determined that governmental regulation of broadcast speech is subject to a standard of review under the First Amendment that is more lenient than the standard generally applicable to the print media. Until the Supreme Court reevaluates that determination, therefore, we shall evaluate the constitutionality of the fairness doctrine under the standard enunciated in *Red Lion* and its progeny.

Syracuse Peace Council, supra, at 5048.

However, since *Red Lion*, the Supreme Court has declined to reevaluate the trusteeship standard, and has instead consistently reaffirmed the scarcity and public trustee rationales for broadcast regulation. For example, in *CBS v. DNC*, 412 U.S. 94 (1973) the Court found that

> It was reasonable for Congress to conclude that the public interest in being informed required periodic accountability on the part of those who are entrusted with the use of broadcast frequencies, scarce as they are. In the delicate balancing historically followed in the regulation of broadcasting Congress and the Commission could appropriately conclude that the allocation of journalistic priority should be concentrated in the licensee than diffused among the many. This policy gives the public some assurance that the broadcaster will be answerable if he fails to meet its legitimate needs.

Id. at 125.

More recently, in the *Metro Broadcasting* case, the Court relied heavily on *Red Lion* in upholding FCC policies intended to promote minority ownership of broadcast stations:

> The Government's role in distributing the limited number of broadcast licenses is not merely that of a 'traffic officer,'...; rather, it is axiomatic that broadcasting may be regulated in light of the rights of the viewing and listening audience and that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public'....

Id. at 547 [citations omitted].

Red Lion was most recently cited with approval by Chief Justice Rehnquist in *Turner Broadcasting Systems, Inc. v. FCC*, No, A-798 (Rehnquist, Circuit Justice 1993). In denying an injunction of the so-called "must carry" provisions of the 1992 Cable Act, the Chief Justice reviewed the possible constitutional frameworks applicable to cable and stated:

> In *Red Lion*...we upheld the Federal Communications Commission's requirement that broadcasters cover public issues, and give each side fair coverage. Noting that there is a finite number of frequencies available, we stated 'it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas...rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.'

Id. at 2, quoting *Red Lion*, *supra*, at 390.

The validity of the trustee concept articulated in *Red Lion* and its progeny has also been reaffirmed by the relevant Committees in both houses of Congress. In its report on the Fairness in Broadcasting Act of 1989, the Senate Commerce Committee stated:

> Unlike print media, broadcasters must obtain a government license to operate, and that license comes with conditions. In return for the broadcaster's agreement to abide by certain rules, the broadcaster receives certain protections. Broadcasters benefit from exclusive use of a valuable resource that ensures them entry into the viewers' homes. Other forms of communications receive no such benefits.

S. Rep at 13.

Similarly, in its report on the Fairness in Broadcasting Act of 1987, the House Energy and Commerce Committee stated:

> The fact that far more people were willing and able to engage in broadcasting than could possibly be accommodated justifies a regulatory scheme that required those granted licenses to serve as fiduciaries or trustees and obligated them to present the views of those who are excluded from the airways.****In a context in which government must select a limited number of licensees to use a scarce public resource, it is constitutionally permissible to impose conditions on the grant of a license to ensure that the public interest is advanced by the choice of licensee.

H. Rep. at 6.

Thus, the notion of spectrum scarcity as a valid basis to impose trusteeship obligations, reinforced by the Supreme Court and Congress, remains sound. It follows then, that the various cases that uphold the constitutionality of PTAR on that basis are also sound. *E.g., Mt. Mansfield v. FCC, supra*; *NAITP v. FCC*, 516 F.2d 526 (2d Cir. 1975). Cable cases like *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985) *cert. denied*, 476 U.S. 1169 (1986)[28] and *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir.) *cert. denied*, 434 U.S. 829 (1977), which First Media argues, set the proper standard for judging the constitutionality of PTAR, are inapposite.[29]

CONCLUSION

None of arguments made in the three pleadings at issue here give the Commission a compelling reason to conduct a broad reexamination of the policy justifications underlying PTAR or the off-network rule at this time. Such an inquiry is especially inappropriate in light of the imminent sunset of the financial interest and syndication rules.

In any event, the Commission should immediately reject First Media's constitutional arguments, as they are based on a Commission decision that is in conflict with long-established, and

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[28]Indeed, the *Quincy* court acknowledged the scarcity of broadcast spectrum and the differences between the two media: "From the perspective of the viewer, no doubt, cable and broadcast television appear virtually indistinguishable. For the purposes of First Amendment analysis, however, [there is]...." Id at 1448.

[29]Other First Amendment cases cited by First Media, including *Consolidated Edison v. Public Service Commission*, 447 U.S. 530 (1980) and *Regan v. Time, Inc.*, 468 U.S. 641 (1984), First Media Petition at 14-15 and cases cited by Hubbard and Channel 41, including *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) and *Buckley v. Valeo*, 424 U.S. 1 (1976), none of which involve broadcasting, are similarly inapposite. *See* Hubbard Petition at 23; Channel 41 Petition at 22.

recently reaffirmed Supreme Court precedent that spectrum scarcity is an adequate justification for broadcast regulation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Gigi B. Sohn, certify that on this 14th day of June, 1993, I caused copies of the foregoing "Comments of the Media Access Project" to be served by mail, first class postage prepaid on the following:

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